

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

JENISYS ENGINEERED PRODUCTS, INC.
d/b/a VICWEST

Case No. 4-CA-28285

and

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION, LOCAL UNION 44, AFL-CIO

David Faye, Esq.,
for the General Counsel.
Walter L. Sales, Esq.,
(*Ogden Newell & Welch*)
of Louisville, Kentucky,
for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on April 11 and 12, 2000. The charge was filed June 11, 1999 and the complaint was issued November 30, 1999.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, (hereinafter Vicwest) , manufactures metal siding and roof decking at its facility in Wilkes-Barre, Pennsylvania, where it annually purchases and receives goods valued in excess of \$50,000 from points outside the Commonwealth of Pennsylvania. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Sheet Metal Workers' International Association, Local Union No. 44, is a labor organization within the meaning of Section 2(5) of the Act.

¹ Transcript page 119, line 17 – 19 incorrectly attributes statements by the General Counsel to this judge.

II. Alleged Unfair Labor Practices

Overview

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The General Counsel alleges that in mid or late May, 1999, Respondent threatened to discharge Eric Kendig because he was active on behalf of, and supported the Union. He further alleges that on June 4, 1999, Vicwest laid off Eric Kendig because of his support for the Union. The General Counsel argues that the lay-off was not motivated by legitimate economic concerns as the Respondent contends. Additionally, he argues that, assuming there was a legitimate reason for a lay-off, Kendig was selected for discriminatory reasons. Respondent denies threatening Kendig and contends that he was laid off for nondiscriminatory economic reasons.

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Eric Kendig was one of the first employees hired by Respondent at its Wilkes-Barre plant. He started work there in February 1998, two months before production began. All production employees received a week and a half of training on the roll forming machine and one week on the Jorns metal folder and a slitter. In April, Kendig and Kris Petrosky, began operating the one roll form machine in the plant. This machine ribs flat pieces of metal to add strength for its use as roofing and siding material. One employee runs the machine by a touch screen computer and the other loads material onto the machine and then unloads and packages it after it is processed. Other employees were assigned to run the trim department machines, i.e., the Jorns metal folder and slitter.

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Petrosky was the lead operator of the roll former, although Kendig also ran the machine frequently. Kevin Belles, the production manager at the plant, wrote a performance appraisal for Kris Petrosky on June 30, 1998 and one for Eric Kendig on July 6. Petrosky was rated "above average" in four categories and "average" in five. Kendig was rated "average" in eight categories and "marginal" in one, "cooperation".

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On December 8, 1998, Foreman Donald Funk gave Petrosky a written warning for insubordination.² Petrosky also ran orders with the wrong material on August 27, September 1, 1998 and June 11, 1999.³ Production manager Kevin Belles reprimanded Petrosky for these errors in writing. Belles also counseled Petrosky for failing to fill out paperwork correctly on August 3, 1998.

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Belles orally reprimanded Eric Kendig on only one occasion, in early May 1999. Kendig was reprimanded for telling Don Funk that the only employees who were allowed to work overtime were those who kissed Funk's ass.

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The Union's organizing campaign

On October 4, 1998, Kendig signed a Union authorization card. Within the next two months five other employees signed authorization cards: Petrosky, Andrew Hudak, Anthony Lanieski, Greg Cook and Tom Nelson. The Union filed a representation petition on December

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² The General Counsel contends that Funk was both a statutory supervisor and an agent of Respondent. I conclude that whether he was a supervisor or agent of Vicwest is irrelevant to any issue in this case. The only thing that matters about Donald Funk is whether I believe his testimony.

³ The first incident may have cost Respondent \$1,500. The third, which occurred a week after Kendig was laid off, cost Respondent \$600.

14, 1998. The Sheet Metal Workers conducted two general meetings for employees; the first in December and the second on January 17. Union Business Manager Matthew Frankowiak instructed employees to tell him about any threats, interrogations, promises or surveillance on the part of Respondent. He explained that he needed this information because it could effect the outcome of the election. Frankowiak also asked employees to keep him informed about Vicwest's anti-Union campaign.

Respondent's campaign against the Union consisted of speeches by Production Manager Kevin Belles from prepared texts and the showing of a video. During the campaign, employee Greg Cook, a card signer, discussed with Belles the union sympathies of other employees. There is no evidence as to what, if anything, he said about Eric Kendig.

The election was conducted on Tuesday, January 26, 1999, pursuant to a stipulated election agreement. Andrew Hudak served as the election observer for the Union; Foreman Donald Funk served as Respondent's observer.⁴ Three employees voted to be represented by the Union; seven voted against representation. The Union did not file objections. Immediately after the election, on January 26, truck driver Anthony Lanieski resigned his employment. Due to the fact that the NLRB Regional Office inadvertently mailed the authorization cards to Respondent's attorney, rather than to the Union, Vicwest learned of the identities of the six card signers in early February 1999.

Respondent's economic situation

Throughout 1999 Respondent's Wilkes-Barre plant was losing money. Even before the organizing campaign and throughout Eric Kendig's employment, Production Manager Kevin Belles repeatedly informed employees that the Wilkes-Barre plant was operating at a loss. Soon after the election, Branch Manger Gary Herb, Belles' boss, told employees that the plant was overstaffed and that there would have to be lay-offs.

Vicwest was having financial problems generally in 1998 and 1999. It reduced the number of its employees nationwide by 13% in 1999. It reduced the number of its production plants from eleven to eight. In November 1998, Vicwest closed its Danville, Kentucky plant; in June 1999, it closed its Fayetteville, North Carolina plant; and in December 1999, it closed its Bowling Green, Kentucky plant. In the Spring of 1999, the stockholders of Jannock, the parent company of Vicwest's parent, Jenisys Engineered Products, put Vicwest up for sale to determine the company's value.⁵

In addition, in Vicwest's eastern region, to which the Wilkes-Barre facility belonged, 2 employees were laid off in Mt. Vernon, Ohio and a hiring freeze was instituted at the Springville, Arkansas plant. Several employees were also laid off at the Wilkes-Barre plant. On June 4, 1999, Eric Kendig, the alleged discriminatee, and Manny Mendoza, a part-time warehouse employee, were laid-off. Later in the summer of 1999, forklift operator Thomas Nelson was laid off, recalled and then laid-off again. In September 1999, Donald Funk, who had been a foreman until June 1999, was also laid off. Funk had been working exclusively as a machine operator since June.

During the spring and summer of 1999, Vicwest hired one truck driver at Wilkes-Barre, who replaced another who either resigned or was fired at about the same time. It also hired

⁴ Funk voted in the election. His ballot was not challenged.

⁵ In March 2000, Jannock was acquired by Magnatrax of Eufala, Alabama.

several salesmen. The hours of production at the Wilkes-Barre plant, however, declined significantly during the summer of 1999. The number of regular hours worked in the trim department was 600 in May 1999, 532 in June, 632.5 in July, 387 in August and 397 in September. Employees worked 72.75 hours of overtime in May, 45 hours of overtime in June, 55 hours of overtime in July, zero in August and ½ hour in September.

In the rollform department, employees worked 536.5 regular hours in May, 685.75 in June, 283.83 in July, 349.25 in August and 334 in September. Overtime hours in the rollform department were as follows: 34.75 in May, 14 in June, 19.25 in July, zero in August and 7 ½ in September. A week after Kendig was laid-off, rollform operator Kris Petrosky left work for 2 weeks of duty in the Army reserve. During this period Donald Funk operated the rollformer.

The brief life of Respondent's second shift

In May 1999, two weeks before Eric Kendig was laid off, Belles announced that VicWest was instituting a second shift. Apparently this was done so that Respondent could use the same forklifts to load trucks that it used to move its metal panels during the production process. Initially, Belles said that the two rollform operators, Kendig and Kris Petrosky, and forklift driver Tom Nelson would be assigned to the second shift, although only two of them would be working the second shift at the same time. Kendig objected to the assignment.⁶ Belles later asked for volunteers to work the second shift. Petrosky and Paul Wosnock, a trim department employee, volunteered.

At the same time that the second shift started, Kendig started working in the trim department on the Jorns metal forming machine. Paul Wosnock, a trim department employee, began cross-training on the roll former. During the life of the second shift, the roll form machine was operated on the first shift by Don Funk with the assistance of forklift operator Tom Nelson. On the second shift, the roll former was operated to some extent by Petrosky and Wosnock, although they appear to have spent most of their time loading trucks with the forklifts. Soon after Kendig was laid off, the second shift was discontinued. This may have had some relationship to the start of Petrosky's reserve duty on June 12.

Credibility resolutions on facts not found

The evidence most potentially damaging to Respondent is Donald Funk's testimony. Funk was demoted from foreman to machine operator in June 1999, and then was laid off by Respondent in September 1999. According to Funk, he attended a profit and loss meeting with Branch Manager Gary Herb and employees Tom Rusak and Paul Wosnock in January 1999. By implication, Kevin Belles was not present. Funk testified that after this meeting, in response to a question from Rusak as to why the plant was losing money, Herb stated that the facility had too many employees and that "[he] couldn't get rid of Eric until after the election".

⁶ Kendig and Don Funk testified that Kendig asked Belles if he was being discriminated against because of his union beliefs in being assigned to the second shift. Kendig testified that both Belles and Gary Herb denied that this was the case. Belles, on the other hand, denies that he ever assigned Kendig to the second shift. He testified that he asked for volunteers and when he broached the subject to Kendig, the latter wasn't receptive to working on the second shift. Belles testified that he does not recall Kendig asking him if he was being put on the second shift due to his union sympathies. Respondent's brief at page 8 appears to accept Kendig's account of the meeting.

5 Funk also testified that Belles told him, at a later date, that Herb told Belles that Herb knew or believed that Eric Kendig had started the union campaign, was a troublemaker and that Herb wanted to get rid of Kendig. Funk stated further that Belles related that Herb told him that if he got rid of Eric Kendig that Kris Petrosky would straighten up and fly right.⁷

10 Gary Herb did not testify. However, Kevin Belles, who no longer works for Respondent, testified that he did attend the January profit and loss meeting and that he does not recall Herb saying anything about laying Eric Kendig off in January 1999, or on any other occasion. He also denies ever discussing anything relating Kendig's lay-off to his union activity with Funk. Moreover, Belles, General Manager Sam Frey and Human Resources Director Teri Marshall contend that Herb, who was generally at the Wilkes-Barre plant only one day a week, had no input in lay-off decisions.

15 I decline to credit Funk's testimony as to what Herb said in January and as to what Belles told him about Herb's plans and motives with regard to Eric Kendig. First of all, if Funk's testimony is accurate, it is difficult to understand why Respondent would wait until May to lay-off Kendig, if Vicwest was merely worried about inviting objections to the election.⁸

20 Secondly, there is a dearth of credible evidence as to what Respondent knew about Kendig's union activities prior to its receipt of the authorization cards on or about February 4, 1999. Thus, Respondent would have had no particular interest in laying-off Eric Kendig, as opposed to other employees in late January. In this regard, I reject Union Business Manager Matthew Frankowiak's testimony that he saw Kendig, Anthony Lanieski and Thomas Nelson wearing union T-shirts and hats in the parking lot of Respondent's facility. Kendig testified that he only wore a union T-shirt to work once and that he wore a company work shirt over it. He testified further that he never wore a union hat and that he never saw any other Vicwest employee wearing either a union hat or shirt.⁹

30 The only credible evidence as to Respondent's knowledge of Kendig's union activities in January 1999 is Kevin Belles' testimony that, from what he heard on the shop floor, he thought that Kendig was "a little bit towards being for the union."¹⁰ I find that Belles shared this opinion with General Manager Sam Frey, the official who Respondent claims made the lay-off decision. Belles denies ever seeing Kendig wear a union T-shirt. Moreover, Donald Funk, a witness whom I deem to be hostile to Respondent, testified that during the organizing campaign, he was unaware of any union activity on the part of Eric Kendig.

40 ⁷ Initially Funk testified that Belles "*indicated to me* that Mr. Herb knew or he felt that Eric started the campaign...and picked him as a trouble maker and wanted to get rid of him" (Tr. 150). After an extended discussion in front of Mr. Funk between the judge and counsel, Funk testified that Belles told him that Gary Herb wanted to get rid of Eric Kendig because he was the union organizer and a troublemaker. (Tr. 161).

45 ⁸ With regard to unfair labor practice charges, Respondent's defense would be essentially the same if it laid Kendig off in January or June. While the timing of the lay-off would be more suspicious, Respondent would have had an argument that it lacked knowledge of Kendig's union sympathies if it had laid him off before the Regional Office sent it the authorization cards.

⁹ The transcript at page 96 indicates that Kendig testified that "Tommy Nelson, a foreman" saw Kendig's T-shirt through his work shirt. Thomas Nelson was a rank and file forklift operator.

¹⁰ I conclude that Belles' belief as to Kendig's union sympathies emanated in part from his discussions with Greg Cook.

Thirdly, I am unwilling to make any factual findings in favor of the General Counsel's case on the basis of uncorroborated testimony by Donald Funk. Not only does Funk bear some degree of animus towards Vicwest, there is substantial evidence of personal animus towards Gary Herb, Kevin Belles, Thomas Rusak, an employee retained by Vicwest after Funk was laid off, and possibly towards Kris Petrosky (See G.C. Exhs. 13-16).

Moreover, Funk's testimony is inconsistent with the affidavit he gave to the General Counsel on October 9, 1999. At trial Funk testified that Kendig and Petrosky had been identified by Gary Herb as leaders of the organizing campaign. However, in his affidavit, he stated that "Kevin [Belles] knew that Andy Hudak was 100 percent for the Union, because they thought he helped started (sic) it. Petrosky and Kendig were believed to be pro-Union also." Funk's affidavit is consistent with the fact that Hudak, rather than Kendig or Petrosky, was the Union's observer at the January 1999 election.¹¹

Finally, while Eric Kendig was the first Vicwest employee to sign a union authorization card, I am uncertain as to what role he played in the organizing campaign. He testified that he did nothing other than discuss the Union with the other five card signers. Respondent's witnesses testified that the employee they suspected of being the Union "ringleader" was truck driver Anthony Lanieski. Lanieski showed Belles his Teamsters Union card shortly before the election and his departure from Vicwest as soon as the election results were announced confirmed their suspicions.

For all of the above cited reasons, I decline to credit Funk's testimony regarding his conversations with Belles about Herb's stated intention to get rid of Kendig, as well as what he allegedly heard Herb say with regard to Kendig in January.

Credibility Resolution with regard to Complaint paragraph 5

The allegation of Complaint paragraph 5, that Respondent, by Kevin Belles, threatened to discharge an employee because of the employee's union activities and support is predicated on uncorroborated testimony by Eric Kendig. Kendig testified that in May, Belles called Kendig into his office after Kendig objected to being assigned to the second shift. Kendig testified that Belles told him that, "you guys had your union vote and you lost. You're going to have to do what me and Gary say to do; and if you don't like it, we'll get rid of you and replace you. We're running a business here."

Belles denies making such a remark and I find his denial at least as credible as Kendig's testimony. Therefore, I dismiss Complaint paragraph 5. Belles' denial is consistent with the fact that he obtained volunteers for the second shift, rather than insisting that Kendig work the shift.

Analysis of the Section 8(a)(3) allegation in Complaint paragraph 6

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge,

¹¹ It is unclear as to whether Hudak still works for Respondent. He was still its employee in October 1999.

animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.¹² Once the General Counsel had made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981).

The General Counsel has established that Eric Kendig engaged in union activity by signing a union authorization card and discussing the Union with fellow card signers. He has also established that prior to laying-off Kendig, Respondent was aware that Kendig had signed a card and suspected that he may have been one of the three employees who voted in favor of Union representation in January 1999. However, I conclude that the General Counsel has not made an initial showing of discrimination, and assuming for the sake of argument that he has done so, I conclude that Respondent has met its burden of proving that Kendig would have been laid off regardless of his union activity.

Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities and their discharge.

W.F. Bolin Co. v. NLRB, 70 F. 3d 863, 871 (6th Cir. 1995).

Findings of anti-union animus and discriminatory motive may also be predicated on the pretextual reasons advanced for a personnel action. It is well settled that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal, *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991); *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988), *Shattuck Denn Mining Corp.*, 362 F. 2d 466, 470 (9th Cir. 1966).

In the instant case, there is neither credible direct nor circumstantial evidence from which I infer discriminatory motive. There is certainly nothing about the timing of the lay-off, four months after the election, that suggests discrimination. Moreover, I conclude that the General Counsel has not established that the reasons Vicwest has proffered for Kendig's lay-off are pretextual.

While one may quibble with the necessity of a lay-off precisely on June 4, it is uncontroverted that the Wilkes-Barre plant was losing money, that production dropped significantly in the summer of 1999 and that Respondent laid off other employees at the same time as, and soon after, the Kendig lay-off. I do not agree with the General Counsel's argument that pretext is suggested by the fact that employees worked overtime in both the rollform department and the trim department after Kendig's lay-off. First of all, in June, employees worked less overtime than in May, despite the lay-off and Kris Petrosky's departure for Army reserve duty.¹³

¹² *Flowers Baking Company, Inc.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F. 3d 863 (6th Cir. 1995).

¹³ The General Counsel also argues that Respondent's receipt of a new forklift and dies at about the time that Kendig was laid off indicates that there was no reason for the lay-off.

Continued

5 I find nothing in the record that belies Respondent's explanation for the lay-off or the selection of Kendig as the employee to be laid off. Vicwest appears not to have needed the number of employees it had in the rollform department, particularly in light of its decision to demote Donald Funk from foreman to machine operator. Moreover, Kendig concedes that he was not as proficient in the operation of the slitter machine in the trim department as Rusak, Wosnock and Hudak, who were retained.

10 The General Counsel argues at page 26 of its brief that Respondent offered shifting explanations for Kendig's lay-off. He is correct that when an employer vacillates in offering a rational and consistent account of its actions, an inference *may be* drawn that the real reason for its conduct is not among those asserted, *Black Entertainment Television*, 324 NLRB 1161 (1997).

15 Although the testimony of Respondent's witnesses is not completely consistent, I conclude that drawing an inference that the proffered reasons are pretextual is unwarranted. General Manager Samuel Frey testified that he decided that a roll form operator should be laid off because this department was the most overstaffed and communicated this to Belles. Kendig's testimony that Belles told him that the trim department, rather than the rollform department, was overstaffed is somewhat corroborated by Human Resources Manager Teri Marshall's testimony that Belles told her the same thing. However, I credit Marshall's testimony that the decision to lay-off Kendig was made by Frey and that she had no input into that decision.

25 Additionally, given the circumstances existing at the Respondent's plant at the time of the lay-off, the two explanations are really not mutually exclusive. When the second shift ended, it appears that the trim department would have been overstaffed if Paul Wosnock returned to it without a lay-off and the roll form department would have been overstaffed if Wosnock had remained in that department. It is clear that Rusak, Wosnock and Hudak were able to operate both trim department machines and Kendig was not. Petrosky, Funk and Kendig were able to operate the rollform machine and it appears that Respondent did not need six machine operators and had no reason to retain Funk in a supervisory/leadman position.

35 Finally, I see no basis for the General Counsel's suggestion that the selection of Kendig, rather than Petrosky or Thomas Rusak for lay-off was discriminatory. First of all, so far as this record shows Kendig's union activity was no more significant than Petrosky's. Secondly, despite the mistakes made by Petrosky in running the rollformer, Respondent's assertion that Petrosky was the better operator and more cooperative employee is corroborated by its 1998 performance appraisals, as well as Petrosky's willingness to work the second shift just prior to

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45 Respondent offers a very credible explanation, however, that I believe negates any inference that can be drawn from the receipt of this equipment. These items were ordered in the fall of 1998. Vicwest tried to cancel the lease for the forklift, but was unable to get out from under its contractual obligations.

Similarly, the hiring of sales employees and a truck driver in the summer of 1999 does not suggest pretext in the lay-off of Kendig. Respondent credibly explained that the basic problem it had at Wilkes-Barre was a dearth of customers. Therefore, the hiring of sales personnel, who were paid in part on commission, is not inconsistent with laying off production employees. Moreover, the sales employees had responsibilities for all Vicwest plants in the eastern region, not just the Wilkes-Barre plant. The hiring of a truck driver, who replaced a driver who terminated his employment is also not inconsistent with the lay-off of machine operators.

Kendig's lay-off.¹⁴

5 In addition to suggesting that discrimination should be inferred from the retention of Kris
 Petrosky, the General Counsel argues that it is also suggested by the retention of Thomas
 Rusak, a trim department employee who never signed a union authorization card. While it is
 true that Rusak was disciplined twice by Respondent, these incidents occurred after Kendig was
 laid off. The General Counsel also suggests that discrimination is indicated by Respondent's
 10 failure to follow Donald Funk's suggestion that Rusak be fired in July 1999, which he argues
 would have mandated the recall of Kendig.

15 There are two reasons for not drawing an inference of discrimination from Respondent's
 retention of Rusak. The first is that it is quite obvious that in July 1999 that Funk's opinions
 were not accorded much weight by Respondent's management. Secondly, the record indicates
 that Rusak was capable of operating both the Jorns metal folder and the slitter in the trim
 department and that Kendig was not as proficient in operating the slitter.

20 There had been no union activity at the Wilkes-Barre plant between January 26, 1999
 and Eric Kendig's lay-off in June. If the choice of an employee for lay-off was motivated by
 union concerns, from this record it appears that Respondent would have selected Andrew
 Hudak, the Union's election observer, rather than Eric Kendig. In conclusion, I find that the
 General Counsel has failed to make an initial showing that Eric Kendig was laid off on June 4,
 1999, due to his activities on behalf of, and in support of, the Union.

25 On these findings of fact and conclusions of law and on the entire record, I issue the
 following recommended¹⁵

ORDER

30 The complaint is dismissed.

Dated, Washington, D.C. [Date]

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 Arthur J. Amchan
 Administrative Law Judge

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45 ¹⁴ I am puzzled by the General Counsel's suggestion that Respondent selected Kendig for
 lay-off rather than Petrosky due to Belles' and Belles' family's "relationship with Petrosky outside
 of work", G.C. brief at 20, 27. If Respondent discriminated against Kendig because of
 Petrosky's business dealings with Belles and his family, this would not violate the Act.

¹⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and
 Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec.
 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed
 waived for all purposes.

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